Supreme Court of the United States.

THE NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

MARIA AMACKER, J. J. AMACKER, HER HUSBAND, G. S. HOWELL, G. GOTTHART, W. H. LITTLE, A. J. STEELE, F. H. RINGE, J. BLANK, J. JORDAN, H. B. REED AND GEORGE DIBERT.

Brief for Plaintiff in Error.

C. W. BUNN,
JAMES B. KERR,
Counsel for Plaintiff in Error.

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OCTOBER TERM, 1898.

No. 282.

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STATEMENT OF CASE.

This is an action in the nature of ejectment brought in the Circuit Court of the United States for Montana by plaintiff in error to recover from the defendants the possession of the south half of the northwest quarter ($S\frac{1}{2}NW\frac{1}{4}$) of section seventeen (17), township ten (10) north, range three (3) west of the principal meridian of Montana.

Plaintiff in error claims title under an act of congress approved July 2, 1864, entitled "An

act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific coast, by the northern route." (13 Stat. 265.)

The provisions of this act are familiar to the court, having been before it many times, and need not be set out at length.

The company on February 21, 1872, fixed that portion of its general route opposite to the land here involved by filing a plat of general route in the office of the Commissioner of the General Land Office. On April 22, 1872, the Commissioner of the General Land Office by direction of the Secretary of the Interior transmitted to the register and receiver of the United States land office at Helena, Montana, within which district said land was located, a diagram showing that portion of the line of general route of the railroad extending through said land district, and directed them to withhold from sale or location, pre-emption or homestead entry all the surveyed and unsurveyed odd-numbered sections of public lands within the limits of forty miles of such general route. This diagram and order were received and filed in said land office on May 6, 1872.

Prior thereto, and on October 5, 1868, one William M. Scott settled upon said tract and filed therefor in said district land office a pre-emption declaratory statement alleging settlement thereon, and in the following year built a house and moved into it. In the fall of that year

(1869) he abandoned the land, moved to Helena and continued to reside there for many years working at his trade and then took up his residence in Butte and never returned to the land. On October 14, 1872, Scott filed in the district land office his amended preemption declaratory statement wholly excluding the land in controversy and substituting other land. (Record page 13, paragraph XIV.) On July 6, 1882, the railroad company definitely fixed the line of its road opposite to and within forty miles of this land by filing a plat of definite location in the office of the Commissioner of the General Land office. Thereafter the road was duly completed.

Between the date of the fixing of the line of general route (February 21, 1872) and the date when notice of the withdrawal of lands thereon (May 6, 1872) was received at the district land office, one William McLean, on May 3, 1872, made homestead entry of said land. It appears that in the fall of 1872, McLean built a shanty on the premises and spent his nights there until the spring of 1873, when he ceased to reside upon the premises. (Record page 13, paragraph XV.) On December 1, 1874, the Commissioner of the General Land Office wrote to the register and receiver informing them that the homestead entry of McLean was held for cancellation because made subsequent to the reservation of said land for the railroad company on general route. On July 3, 1879, the register and receiver wrote to the Commissioner that on June

2, 1879, they had notified McLean in accordance with land office circular of December 20, 1873, to show cause within thirty days why his entry should not be cancelled for failure to make proof and payment within the statutory period; that McLean had failed to take any action in the premises and that they therefore recommended the cancellation of the entry. By his letter of September 11, 1879, the Commissioner informed the register and receiver that as a consequence of McLean's default his said homestead entry was thereby cancelled. The railroad was as shown definitely located July 6, 1882, and McLean died in August, 1882; on March 15, 1883, his widow, Maria McLean (now Maria Amacker), one of the defendants in error, applied to enter and purchase under the provisions of the act of congress of June 15, 1880 (21 U. S. Stat. 237.)

This application was contested by the railroad company and in such contest the Commissioner, on February 20, 1885, rendered a decision allowing the application and held that the tract was excepted from the grant to the company by reason of the existence of McLean's right to purchase it under the act of June 15, 1880. On appeal this decision was affirmed by the Secretary on March 28, 1887, and on June 17, 1887, a patent was issued to Mrs. McLean. The other defendants claim title through her. The land is non-mineral and is worth over $20,000,00.

It was held by the Circuit Court in the opinion by Judge Knowles reported in 53 Federal Re-

porter, page 48, that the land was free from claims or rights at the date of definite location and that it passed by the grant to the railroad company. It was held by the Circuit Court of Appeals (opinion by Judge Gilbert, 15 U. S. A. 279); (a) that the Scott preemption declaratory statement did not except the lands from the grant, because its amendment, wholly excluding therefrom the lands in controversy and fixing the preemption upon other lands, was an effectual cancellation of the former declaratory statement so far as the land in controversy is concerned (p. 283-4); (b) that the act of April 21, 1876, protected and revived the cancelled homestead entry of McLean, and that the act of July 15, 1880, conferred upon McLean and his successors such a right to purchase, *as constituted a claim attached to the land operating to take it out of the railroad grant.*

ASSIGNMENT OF ERRORS.

The plaintiff in error now assigns the following errors in the ruling and judgment of the Circuit Court of Appeals:

First. The court erred in holding that the cancelled homestead entry of McLean was revived and protected by the act of April 21, 1876.

Second. The court erred in holding that the act of July 15, 1880, attached any right or claim

to the land which would take it out of the railroad grant.

Third. The court erred in holding that the land was excepted from the grant to the railroad company and in rendering judgment against the plaintiff in error.

ARGUMENT.

McLean's Entry.

The homestead entry of McLean was allowed on May 3, 1872, between the date of the filing of the map of general route and the date when the notice of such filing was received at the local office. The allowance of the entry at that time is sustained by the Circuit Court of Appeals by virtue of the provisions of the act of April 21, 1876 (19 Stat. 35, Sec. 1), which provides as follows:

> "Sec. 1: That all preemption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith, by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office, of the district in which such lands are situated, or after their restoration to market by order of the general land office, and where the preemption and homestead laws have been complied with, and proper

> proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto."

It may be conceded that this act confirms all such entries as are descibed therein, made upon lands within the limits of a railroad grant, between the date of an executive withdrawal and the date when notice of such withdrawal is received at the local office. But the provision of the act is express that the entries confirmed are those alone where the preemption and homestead laws have been complied with and proper proofs thereof have been made by the parties holding such tracts. No such facts existed in this case. McLean resided on the premises only during the winter of 1872-1873 when he abandoned the land. The record shows that his entry was held for cancellation within 19 months after it was made because it had been allowed subsequent to the reservation on general route, and that it was finally cancelled on September 11, 1879, for failure to comply with the homestead law. It is manifest that the act of April 21, 1876, was passed for the purpose of confirming entries made before the date of withdrawal and the date when notice of such withdrawal was received at the local office, so far at least as these withdrawals were executive and not legislative. But the provisions of the act are further confined by its express terms to those cases where the homestead and preemption laws have been com-

plied with and proof of this fact is made. But in this case the record shows affirmatively that McLean did *not* comply with the law and no pretense is made of any proof of such compliance so that his case is outside both the terms and the spirit of the act.

Purchase Under Act of June 15, 1880.

The railroad was definitely located June 6, 1882. McLean died in August, 1882, and in 1883 his widow applied to purchase under section 2 of the act of June 15, 1880, (21 Stat. 237), and her application was allowed. Upon her application so made the patent was issued. The allowance of her purchase was justified by the court below and by the department on the ground that at the date of definite location McLean had the right to purchase under the act of June 15, 1880, and it was held that such right to purchase existing at that date operated to except the land from the grant.

Section 2 of the act provides as follows:

> "That persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads may have been attempted to be transferred by *bona fide* instrument in writing may entitle themselves to said lands by paying the government price therefor, and in no case less than one dollar and twenty-five cents per acre; and the amount heretofore paid the government upon said

> lands shall be taken as part payment of said price; provided, this shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws."

It is not pretended that the act places the lands subject to its provisions in the category of reserved lands or in any manner withdraws them from the public domain. They still remain "public lands" in the fullest sense of that term subject to any and every lawful disposition. They may be preempted or homesteaded by others, or may be sold by the United States, or granted away, or placed in reservation. Therefore it would seem that they would necessarily pass under the Congressional grant just as other public lands to which no right had *attached*. The fact that an individual may have the inchoate and unexercised option to purchase does not withdraw them from the "public lands." Any reasoning that would lead to such a conclusion would reach the absurdity of holding *all public lands* withdrawn from the grant; for every acre of public land is subject to the right of preemption or homestead, or acquisition under some law by any citizen of the United States possessing the requisite qualifications. The naked and unexercised option to purchase cannot take lands out of the class of public lands or out from under the Congressional grant. To except them from the grant requires the *attachment* of some right.

As Mr. Justice Miller delivering the opinion of this court said in the case of *Kansas Pacific Railway vs Dunmeyer*, 113 U. S. 629, 644:

> "Of all the words in the English language, this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation."

This language has been repeated, re-affirmed, emphasized and put in various forms in the subsequent decisions of this court following the Dunmeyer case. Mr. Justice Brewer in the opinion of the Court in *Northern Pacific Railroad Company vs Colburn*, 164 U. S. 383, 386-7, quotes several of the decisions and holds that this language is applicable to the Northern Pacific grant.

The right to purchase the land, conceding that McLean had any right, was a mere privilege or option of which he never availed himself and of which his successors did not seek to avail themselves until three years after the act of 1880 was passed and until the year following the definite location of the railroad and the attachment of the railroad grant. The land was clearly public land July 6, 1882, when the line of road was definitely located and passed under the grant. See opinion of Judge Knowles in this case 53 Federal Reporter 54-58.

The spirit of the law is found in the words of Mr. Herbert of Alabama who introduced the bill. In the debate on the subject he said:

> "The land is not disposed of until the persons to whom the privilege is given to buy the lands shall actually go forward and buy them. * * * Every foot of public land that belongs to the United States now, will belong to the United States after the passage of this bill. * * * It merely lays down rules and prescribes regulations, under which lands can be purchased, and then it describes the effect of the purchase of the lands; that is all. All the lands that belong to the United States will belong to it after the passage of this bill, and if persons do not see proper to go forward and enter lands under the bill, all the lands will continue to belong to the government as it does now."
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> *10 Congressional Record*, 46th Congress, Second Session, 123-125.

In *Nathaniel Banks*, 8 L. D. 532, Secretary Noble says:

> "It seems to be claimed by counsel in the motion for review, that a purchase under the act of 1880 is not a new or original entry, but a re-instatement and consummation of the homestead entry, operating by relation from the date of such entry. The act, however, by protecting 'all vested rights that might intervene prior to application to purchase' (George S. Bishop, 1 L. D. 69), expressly deprives the purchase of any operation by relation as to such rights, and there is nothing in the language or reason of the law, to sustain the position contended for, or to indicate that anything more was intended than the conferring upon a particular class of persons the right of private

cash entry of certain lands, operative from the date of such entry."

See also:

U. S. vs. Perkins, 44 Fed. Rep. 671;
Mulloy vs. Cook (Ala.) 10 So. Rep. 349.

In the next place it is very doubtful if the act of 1880 operates to give the widow any right. The language of the act grants the right to the party making the entry or the transferee of such party by *bona fide* instrument in writing. It does not in terms include the widow or children of the entryman, while sections 2291, 2292 and 2307 of the Revised Statutes relating to homestead entries contain special provision in favor of widow and children, as did also the act of September 7, 1850, known as the "Oregon Donation Act," 9 Stats. 496, 499. Not only therefore is the widow not mentioned in *this* act, but we find in other acts of Congress touching the same subject the widow is specifically named as entitled to rights originally vested in her husband. The inference seems to us clear that Congress did not intend to grant to others than the homesteader himself, or transferee holding under him by instrument in writing, any rights under the act in question. This view was indicated in the opinion of Mr. Justice Brewer in *Gulliher vs. Cadwell*, 145 U. S. 368.

The last suggestion is met by the learned Circuit Court of Appeals, by saying it is unnecessary to determine that question in this case, be-

cause McLean was still living when the map of definite location was filed and the railroad company's rights were fixed. But this argument of the court begs the question and rests back for support on the proposition that McLean's rights were vested by mere passage of the law and without any purchase or application made by him. The question is in the case and necessary to be decided unless it can be held that the mere passage of the act without any application to purchase under it *attached* a right in the land in favor of McLean.

The Company's Title.

It appears from the record that on July 2, 1864, the date of the grant, the land was public land and that when the company's rights attached the Scott preemption declaratory statement was an "expired filing" and in fact cancelled by the filing of an amended declaratory statement from which this land was omitted. This was the ruling both of the trial court and of the court of appeals.

The latest ruling of the Department is to the effect that a filing is extinguished by lapse of the statutory period prescribed for making proof and payment.

Union Pacific Ry. Co., vs Fisher, 28 L. D. 75 (Advance Sheets).

And the making of another filing excluding the land covered by one already made extin-

guishes the first.

Sanborn vs Knight, 75 N. W. Rep. 1009(Wisconsin).

Neilson vs Railroad Company, 9 L. D. 402.

And the entry of McLean whether properly or improperly allowed was cancelled and the land abandoned by McLean before the date of the definite location of the road. The land was therefor public land, free from claims and rights, at the date of definite location and the legal title passed to the company on that date.

St. P. & P. R. R. Co. vs N. P. R. R. Co., 139 U. S., 1, 5;

Deseret Salt Co. vs Tarpey, 142 U. S. 247.

The title thus acquired is the legal title as distinguished from the equitable title, and is sufficient to sustain an action in ejectment.

Deseret Salt Co. vs Tarpey, supra.

The patent issued being for land the title to which had already passed from the government was void. It did not operate to convey the title, for the government had no title to convey. This fact may be shown in an action of ejectment equally as well as in an action in equity, and being established, the patent is no bar to the recovery by the holder of the true title.

Doolan vs Carr, 125 U. S. 624;

Burfenning vs C. St. P. M. & O. Ry., 163 U. S. 321.

We submit that the judgment of Circuit Court of Appeals should be reversed.

C. W. BUNN AND
JAMES B. KERR,
Counsel for Plaintiff in Error.